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No. 721

In the

Supreme Court of the United States

OCTOBER TERM, 1962

CARSON J. MAY,

Petitioner,

vs.

PENNSYLVANIA RAILROAD COMPANY,
A CORPORATION,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR FRANKLIN COUNTY, OHIO

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Petitioner, Carson J. May, prays for a rehearing of this Court's order entered in the above case on February 18, 1963, which order denied petition for writ of certiorari to the Court of Appeals for Franklin County, Ohio, to review the judgment and decision of that Court of Appeals in Case No. 6749 entitled Carson J. May vs. Pennsylvania Railroad Company, a corporation.

This petition for rehearing is predicated upon the decision of this Court in the case of *Gallick vs. Baltimore & Ohio Railroad Company*, ... U.S. ....., (No. 76, October Term, 1962), which decision was an

nounced and rendered subsequent to the filing of petition for certiorari in the instant case and on the same date that the order denying petition for certiorari herein was entered.

This case, like the *Gallick* case, was an action arising under the Federal Employers' Liability Act (Title 45, U.S.C., Sections 51 and following) and originated in the state courts of Ohio. The principal basis upon which the Court of Appeals affirmed the directed verdict against petitioner in this case is in direct conflict with the holding of this Court in the *Gallick* case on the test to be applied in determining an issue of the railroad's foreseeability of harm under that Act. In support of its judicial conclusion that the respondent railroad herein was as a matter of law not negligent, the Court of Appeals for Franklin County stated in its opinion (Petition for Certiorari, App. B-32):

> "In this case it appears to be the first time that the tub of coal was ever carried through the doorway while the motor car was in the entranceway, * * *."

In *Gallick* this Court expressly condemned and held erroneous the charge of the trial court on the issue of the railroad's reasonable anticipation or foreseeability, which charge was identical in principle to the foregoing statement of the Court of Appeals in this case. In condemning that concept, this Court stated and held:

> "In the second place, in deciding whether respondent had reason to anticipate and foresee any harm to petitioner, the trial court instructed the jury to take into account 'the past experience respecting the location and conditions in question' and the fact 'that no occurrence of the kind here alleged either occurred, or was known by defendant to have occurred, at or near this place before August of 1954.' The jury thus might have determined that, since there had been no similar incidents at this pool in the past, the respondent had no specific 'reason' for anticipating a mishap or injury to

petitioner—a far too narrow a concept of foreseeable harm to negative negligence under the Federal Employers' Liability Act."

A surface examination of the two cases may prompt the observation that in the instant case the issue was one of the sufficiency of the evidence to support a finding of negligence of the railroad while in the *Gallick* case this Court was dealing primarily with the sufficiency of the evidence to support a finding of causal relationship between antecedent negligence of the railroad and the injuries of the employee. Such a surface examination will also reveal the obvious dissimilarity between the facts in the two cases. A quick conclusion might be reached, therefore, that the decision of the Court of Appeals in this case is not in conflict with this Court's decision in the *Gallick* case.

A penetrating and sound analysis, however, will dispel such a conclusion. First, "a far too narrow a concept of foreseeable harm" constitutes an equally erroneous test whether applied to determine an issue of negligence or an issue of causal relationship between negligence and harm. Indeed, the two issues are in logic interrelated and interlocked, and the element of foreseeability is common to both. It follows that the correct test to determine foreseeability must be identical and consistent as applied to each of those issues.

Secondly, in the foregoing portion of the *Gallick* decision, quoted supra, this Court was directly considering the issue of the railroad's negligence in connection with the special findings of the jury. The alternative ground of the respondent railroad in that case was based upon the contention that the injury was not reasonably foreseeable, and that, therefore, there was no *negligence*. This Court prefaced its opin-

ion with respect to this alternative ground in the following statement:

> "We agree with respondent that reasonable foreseeability of harm is an essential ingredient of Federal Employers' Liability Act *negligence*." (emphasis supplied)

Thereafter, this Court in that portion of the opinion first quoted supra, condemned the charge of the trial court as a far too narrow concept of foreseeable harm "to negative *negligence* under the Federal Employers' Liability Act." (emphasis supplied) It is clear, therefore, that this Court held in the *Gallick* case that the concept of whether any similar incident had occurred previously was far too narrow and erroneous whether applied to the issue of negligence or to the issue of causal relationship between negligence and harm.

The Court of Appeals in this case applied that identical erroneous concept to the issue of negligence and thereby deprived petitioner of his right to trial by jury.

Thirdly and in elaboration of the foregoing, the *Gallick* holding on foreseeable harm, although applied to dissimilar facts, does apply in principle to this case. The only lawful result of such application is a case for the jury. In *Gallick* the link between the conditions for which the railroad was responsible and the accrual of the cause of action was the bite of an insect resulting from or coming from those conditions. If the respondent railroad could have reasonably foreseen that an insect emanating from those conditions might bite an employee, in other words, the legal requirement for a jury issue on respondent's foreseeability of harm was sufficed, even though such link could be found only by inference. It was error, moreover, even to inform the jury that lack of a similar prior incident could negate such reasonable foreseeability. In the instant case for the

purpose of this petition we may assume (although we do not concede) that there were no unusual antecedent conditions. The motor car was blocking the doorway as it had in the past. A tub loaded with coal had not previously been carried through the doorway while blocked by the motor car, but the tub had been carried through the open doorway previously. The cause of action accrued to petitioner when he was forced to twist *after* an employee of respondent preceded petitioner with that loaded tub through the obstructed passageway. That act or conduct of respondent through its employee, like the antecedent conditions existing in *Gallick*, was the "spring board" from which injury to the employee eventually resulted. It certainly was as reasonable for respondent to foresee that injury or harm to petitioner might result from that act as it was for respondent to foresee that an insect bite (equated with harm) might result from the conditions in *Gallick*.

The Court of Appeals, therefore, committed the same error in principle in holding that there was no negligence because the loaded tub had never previously been carried through the doorway while it was blocked, as that of the trial court in the *Gallick* case in instructing that the jury could consider the fact that no such incident as the insect bite had ever occurred before. In each case an erroneous test of foreseeability of harm was applied. The only difference was that in the instant case the error denied a jury trial altogether, whereas in *Gallick* the error led to a special finding which could have been given an unlawful effect.

There exists, therefore, at present in the State of Ohio the following inconsistency in the jurisprudence dealing with cases arising under the Federal Employers' Liability Act: a fundamental error of law has been condemned by this Court where incorporated as a part of the trial court's instructions to the jury, but that same error stands unre-

versed where applied to the ultimate extent of depriving the employee of his right to trial by jury. This case is, we submit, accordingly deserving of certiorari jurisdiction; and this Court should remove and correct that inconsistency.

Respectfully submitted,

C. Richard Grieser,
8 East Broad Street, Columbus 15, Ohio,
Attorney for Petitioner.

CERTIFICATE

The undersigned attorney for petitioner, by manuscript signature hereto, does certify to this Court that the foregoing Petition for Rehearing is presented to this Court in good faith and upon the grounds set forth therein relating to the intervening decision of this Court cited therein, and is not presented for delay.

C. Richard Grieser,
8 East Broad Street, Columbus 15, Ohio,
Attorney for Petitioner.